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D. H. Smith
Pres. I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-191511

DATE: July 13, 1978

MATTER OF: Northwest Marine Technology, Inc.

DIGEST:

1. Protest against sole-source procurement would normally be untimely where not filed prior to date for receipt of proposals. However, where protester submitted obviously nonconforming proposal and agency decided, in effect, to reexamine contemplated sole-source award, timeliness is properly measured from date protester is advised of agency affirmation of original intention.
2. Protest of sole-source procurement is denied where protester fails to show agency determination, including need for compatibility and uniformity, is without reasonable basis; propriety of evaluation of unsolicited proposal will not be questioned where protester fails to present clear evidence of fraud, abuse of authority, or arbitrary agency action.

Northwest Marine Technology, Inc. (NMT), protests the award of a contract for three wire fish tag injector systems plus color-coded tags to its competitor, Technical Research Co. (TRC), pursuant to request for proposals (RFP) NASO-78-111, issued on December 23, 1977, by the National Oceanic and Atmospheric Administration, Department of Commerce (NOAA). The subject RFP contemplated a sole-source award to TRC, based upon NOAA's determination that only TRC equipment was suitable for its minimum needs. Notice

that the procurement was being negotiated with TRC was published in the Commerce Business Daily (CBD) of December 28, 1977.

Upon learning of the CBD notice, an NMT representative called the contracting officer on January 12, 1978, to request a copy of the solicitation. He was informed that a sole-source award to TRC was to be made, but the contracting officer did forward a copy of the RFP. On the same day, amendment 1 to the RFP was issued extending the date for receipt of TRC's proposal from January 11, 1978, to January 23, 1978.

Prior to the closing date, NMT submitted an unsolicited proposal. Since the price quoted by NMT was significantly less than that in the TRC proposal, the contracting officer sent both proposals to the requiring activity for evaluation, even though the NMT proposal offered a non-color-coded system that did not meet the RFP specifications. It appears that about the time NMT submitted its proposal, it orally notified NOAA of its intention to protest any sole-source award to TRC.

After evaluation of the proposals, NOAA informed NMT (in a letter dated February 24, 1978) that its proposal failed to meet NOAA's needs, and that an award to TRC was contemplated. The letter also requested NMT to confirm in writing that it desired to protest. NMT sent this confirmation on March 3, 1978.

NOAA responded to NMT's protest on March 13, 1978, reiterating the prior agency position and informing NMT that since the requirement was determined to be urgent, award was made to TRC on that same day. NMT's protest to this Office was received on March 21, 1978.

Timeliness

As an initial matter, NOAA argues that since NMT's protest is essentially that the sole-source procurement

was improper, it should have protested prior to the closing date for proposals, January 23, 1978, as required by our Bid Protest Procedures with respect to allegations of improprieties apparent on the face of a solicitation. See 4 C.F.R. § 20.2(b)(1) (1977).

While we would normally agree with NOAA on this aspect of the protest, we do not believe the protest should be considered untimely in view of the particular circumstances present in this case. When NOAA received NMT's obviously nonconforming proposal, rather than rejecting it for this reason, the agency determined, in effect, to reexamine its needs and contemplated sole-source procurement. In these circumstances, we believe the timeliness of NMT's protest should properly be measured from the time the protester was advised of NOAA's affirmation of its original intention to procure on a sole-source basis. Considered in this light, the protest is timely.

Further, the agency accepted the unsolicited proposal for technical evaluation, performed the evaluation, and rejected the proposal. Since one of NMT's grounds of protest is improper evaluation of its proposal, the protest on this point would be timely under section 20.2(b)(2) of our procedures, because NMT protested within 10 working days of receiving knowledge of NOAA's rejection of its proposal.

For these reasons, we find NMT's protest timely, and we will consider the merits.

Propriety of the Solicitation

As stated, NMT's principal ground of protest is that a sole-source negotiated procurement of this equipment is improper because NMT's product can meet the Government's needs at a lower cost. NMT also argues that the notice of sole-source procurement was not adequate to inform it and any other interested parties of the solicitation.

NOAA relies on the authority of 41 U.S.C. § 252(c) (10) (1970) and section 1-3.210(a)(1) of the Federal Procurement Regulations (FPR), 41 C.F.R. § 1-3.210(a) (1) (1977), which permit procurement by negotiation where it is impracticable to secure competition and, specifically, where property or services can only be obtained from one person or firm. The contracting officer determined that the prerequisites for sole-source negotiation were met, based upon the using activity's requirement for equipment compatible with that already in use and because only the TRC equipment would insure maintenance of accurate controlled statistics necessary to the continuation of established research activities. TRC is the sole manufacturer of a color-coded tagging system. NMT, the only other producer of wire fish-tagging equipment, uses an etched binary coded wire tag.

The agency justified rejection of the NMT proposal on a number of grounds, specifically that, (1) it had extensive favorable experience with the TRC equipment and anticipated a lower productivity with NMT equipment based on evidence from users of NMT's product; (2) use of NMT equipment together with existing TRC equipment was not feasible, and parallel use of two different systems imposed an unacceptable burden of personnel training, maintenance, spare parts retention, and modification of existing installations; (3) contemplated future equipment changes would be complicated by use of two different systems while a third was being phased in; (4) NOAA is the only user of color-coded tags on the Pacific coast and its fish can be readily identified thereby; and (5) problems existed with the NMT equipment, including a higher rate of tag loss and inadequate separation of properly tagged from improperly tagged fish.

NMT has conceded that its equipment may be incompatible with TRC's, preventing the use of color-coded

tags with NMT machines. It has also admitted problems with separation, although it states that later models of its product do not have this deficiency. NMT claims that the tag loss figures are incorrect, and that the problem can be eliminated by a simple adjustment to the equipment. The protester also disputes the agency's evidence on efficiency, claiming that its product is more labor efficient than TRC's.

We have consistently held that the determination to procure on a sole-source basis is primarily a matter for procurement officials, who have wide discretion in this regard. We will only question such determinations if it is shown that the agency acted without a reasonable basis. Bingham Ltd., B-189306, October 4, 1977, 77-2 CPD 263.

NOAA had significant experience with TRC's equipment, and it determined that NMT's product would not be as beneficial to the Government as TRC's in terms of compatibility, maintenance, personnel cost, future plans, and convenience. Even if we were to accept NMT's arguments that the defects observed by NOAA with respect to its equipment are based on faulty evidence or are easily correctible, we conclude, based upon the detailed technical evaluations, that there would still be support for NOAA's decision to use the TRC equipment. Therefore, the agency's determination to make a sole-source award to TRC is not without a reasonable basis, and we will not question it. Further, as NOAA points out, we have held that compatibility and uniformity are themselves sufficient justification for a sole-source procurement. See B-161700, September 5, 1967.

Contrary to NMT's assertions, we believe the record shows that NOAA gave fair consideration to the NMT equipment, including consultation with the protester.

NOAA would have been justified in rejecting NMT's proposal as technically unacceptable since it did not comply with the legitimate requirement for color coded tags and compatibility and uniformity. Even so, the agency evaluated the proposal, and we will not question the evaluation absent clear evidence of fraud, abuse of authority or arbitrary action. NMT has not presented such evidence. See Blackeslee Prestress, Inc., Formigli Corporation, and Dow-Mac Concrete, Ltd., B-190778, April 17, 1978, 78-1 CPD 297.

We can find no support for NMT's argument that the notice of this procurement was improper or inadequate. In light of the sole-source determination, all that was required of NOAA was to publish notice in the CBD of its intent to negotiate with TRC. See 41 C.F.R. § 1-1.003-2(a) (1977). As NOAA points out, this procurement was not a small purchase (defined as one under \$10,000, 41 C.F.R. § 1-3.600 (1977)), so the broader notice requirements of 41 C.F.R. § 1-1.1002-2 (1977) do not apply here. The requirement to solicit proposals from the maximum number of qualified sources, 41 C.F.R. § 1-3.101(c) (1977), cited by NMT, obviously does not apply where a proper sole-source determination has been made, since there is by definition only one qualified source.

NMT's remaining arguments are conclusory statements: that the Government's problem with its product can be solved easily and that third parties prefer NMT equipment. They do not demonstrate a lack of support for the sole-source determination.

Accordingly, NMT's protest is denied.

R. R. Kimm.

Deputy Comptroller General
of the United States